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CIV533328
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

SIX4THREE LLC,

Plaintiff,

vs.

FACEBOOK INC., et al.

Defendants.

Case No. CIV533328

**ORDER AND NOTICE OF HEARING
NO. 2**

Assigned for All Purposes to
Hon. V. Raymond Swope, Dept. 23

Hearing Date: Friday, December 7, 2018
Hearing Time: 9:00 a.m.
Dept.: 23

Action Filed: April 10, 2015

On December 3, 2018, the Court received an email from counsel for defendant FACEBOOK, INC. ("Defendant" or "Facebook") requesting clarification of the Order Denying Defendant Facebook, Inc.'s Ex Parte Application, issued November 30, 2018, and for further orders of the Court. A true and correct copy of that letter is attached as **Exhibit A**.

On December 4, 2018, the Court responded by email to all parties regarding Defendant's letter and memorializes the instructions given and gives further instructions in this Order.

IT IS HEREBY ORDERED as follows:

Defendant shall file and electronically serve an ex parte application pertaining to the issues raised in its letter dated December 3, 2018 no later than December 5, 2018 at 11:59:59 p.m.

Plaintiff shall file and electronically serve any opposition no later than December 6 at 11:59:59 p.m.

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1 All counsel of record and the parties, including Plaintiff SIX4THREE LLC's ("Plaintiff" or
2 "Six4Three") principal Theodore Kramer and non-California licensed attorney Thomas
3 Scaramellino, who is a member of Six4Three's legal team and a law clerk for Plaintiff counsel David
4 S. Godkin, shall appear in person for hearing on Friday, December 7, 2018 at 9 a.m. in Department
5 23. No telephonic appearances are permitted.

6 Defendants' ex parte application will be heard with the Discovery Conference set for the
7 same date and time.

8 As this is related to the prior ex parte application heard on November 30, 2018, the matter
9 will be reported.

10
11 IT IS SO ORDERED.

12
13 DATED: December 5, 2018

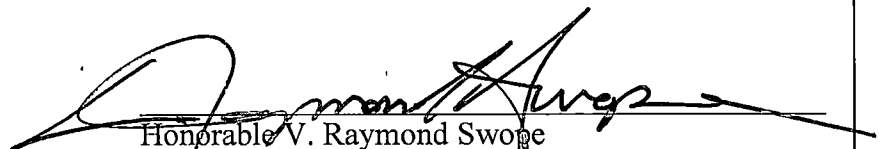
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16 Honorable V. Raymond Swope
17 Judge of the Superior Court
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Exhibit A

From: Celeste Alas <CAlas@durietangri.com>
Sent: Monday, December 3, 2018 12:02 PM
To: ComplexCivil
Cc: 'kruzer@birnbaumgodkin.com'; 'sgross@grosskleinlaw.com';
'godkin@birnbaumgodkin.com'; SERVICE-SIX4THREE; 'pthoreen@altshulerberzon.com'
Subject: Six4Three, LLC v. Facebook, Inc. et al, Case No. CIV 533328
Attachments: 2018.12.03 FINAL Mehta to Judge Swope re spoliation and forensics.pdf

Your Honor:

Attached please find a letter from Sonal Mehta on behalf of Defendant Facebook, Inc.

Respectfully Submitted,

Celeste Alas
Legal Secretary
Durie Tangri LLP
217 Leidesdorff Street
San Francisco, CA 94111
T (415) 362-6666
F (415) 236-6300
www.durietangri.com

Durie Tangri

Sonal N. Mehta
415-362-6666 (main)
smehta@durietangri.com

December 3, 2018

VIA EMAIL TO THE COURT AT COMPLEXCIVIL@SANMATEOCOURT.ORG

The Honorable Judge Raymond V. Swope
Superior Court of California, County of San Mateo
Department 23, Courtroom 8A
400 County Center
Redwood City, CA 94063

Re: *Six4Three, LLC v. Facebook, Inc.*
Case No. CIV 533328

Dear Judge Swope:

We apologize for having to trouble the Court again, but need to bring to Your Honor's attention a number of troubling events and disclosures that have come to light between the hearing before Your Honor on Friday afternoon and the writing of this letter on Sunday evening.

First, we have reason to believe that further evidence has been spoliated than was previously disclosed. We have been informed by Stroz Friedberg that, pursuant to the Court's November 30, 2018 Order, they attempted to access Mr. Scaramellino's Dropbox account to preserve evidence from that account. When they did so, they received a notification that the account has been deleted, and that, as a result, no data relating to the account is available. We understand that they followed up with Mr. Scaramellino (who himself is a member of the "legal team"), and he informed them that he had deleted the account "***on counsel's advice.***"

It is unclear the extent to which this Dropbox account overlaps with the "Six4Three Dropbox Account" that was the subject of discussion with the Court last week or whether this is a second Dropbox Account that was not disclosed to the Court. And now that it has been deleted, it is also unclear the extent to which we will ever know what was on it. But the account was registered to "tom@six4three.com," which at least strongly suggests that the account includes material relating to this litigation and the issues presently before the Court, all of which have been under preservation orders.¹

¹ Relatedly, we have not been able to get a clear statement from Mr. Gross as to what steps he took to try to unmark the documents marked for deletion in the "Six4Three Dropbox," or when he attempted to do so.

Second, we have been informed by Stroz Friedberg that Mr. Scaramellino has declined to cooperate in the preservation of cloud-based storage systems for email because he does not view the Court's order as extending to such systems. We understand that, while Mr. Scaramellino has provided password information for his "business" Google account (which includes both Google Drive storage and his "business" Gmail account), he has told Stroz Friedberg that he does not believe they are authorized to access email in this account and may only access the documents on the Google Drive portion of this account. We also understand that Mr. Scaramellino has refused to provide password information for what he described as his "personal" Gmail account.

Likewise, although Mr. Kramer has provided his password, his counsel has failed to respond to requests that Mr. Kramer cooperate in providing the two-factor authentication (which involves a unique code sent to his mobile phone) as would be necessary to access and preserve his email. To the contrary, Mr. Gross has stated: "Our position is that the Court's order does not include within its scope the imaging of Messrs. Kramer's or Scaramellino's web-based *email* accounts. We provided the credentials of their respective Google accounts for the sole purpose of providing Stroz Friedberg access to the associated cloud storage services, which go by the name Google Drive. We are not disputing that the Court ordered that Stroz Friedberg be given access to such cloud storage services. The fact that the credentials provided for access to such Google Drive accounts also, by virtue of the way in which Google has arranged things, also can be used to access Messrs. Kramer's or Scaramellino's web-based *email* accounts does not mean that the Order provides for any imaging of the contents of those accounts."

The lack of cooperation by Messrs. Scaramellino and Kramer is inconsistent with both the text and spirit of the Court's November 30 Order. At the outset, Gmail is a "cloud-based storage system" within the terms of the Court's Order. *See, e.g.*, <https://gmail.googleblog.com/2012/11/gmail-and-drive-new-way-to-send-files.html?m=1>. Indeed, Gmail and Google Drive are integrated cloud-based systems designed to allow for the seamless storage and transmission of documents. Moreover, the available record shows that much of the relevant evidence, including communications between Six4Three and its legal team and third parties, would take the form of email including Gmail. Mr. Kramer's communications with the DCMS Committee were all via his Gmail account. Further Six4Three's privilege log and Mr. Scaramellino's deposition testimony confirm that Mr. Scaramellino's involvement in this case was via at least the following email addresses: thomas.scaramellino@gmail.com and 643litigation@birnbaumgodkin.com.

Third, last week Mr. Gross advised the Court that the contents of the Six4Three Dropbox account had been copied to a separate Box account hosted by Mr. Gross's law firm. We understand that Mr. Scaramellino has provided his credentials for that account to Stroz Friedberg and provided consent for them to access that storage. Mr. Gross advised us that Mr. Scaramellino was not authorized to provide credentials to that account (raising questions as to exactly when Mr. Scaramellino ceased to be part of the "legal team,"), and taking the position that the Court's Order does not permit Stroz Friedberg to image or preserve that account. Although this position is inconsistent with the Court's November 30 Order, Facebook agreed in principle to Mr. Gross's suggestion that the parties enter into a stipulation

and order clarifying that portions of that account with data relating to this case be imaged and preserved by Stroz Friedberg. Facebook anticipates that such a stipulation will be filed today.

* * *

In view of the apparent deletion of additional information and the ongoing lack of transparency and cooperation by Mr. Kramer, Six4Three, and its legal team, Facebook respectfully requests that the Court consider issuing:

- (1) An order clarifying that the November 30, 2018 Order was intended to authorize Stroz Friedberg to collect and preserve all business or personal email accounts for Messrs. Kramer and Scaramellino, and that Messrs. Kramer and Scaramellino should provide identification of all such accounts and passwords by 5:00 pm Pacific Time on Monday, December 3 and otherwise cooperate with Stroz Friedberg to allow them to access and preserve these email accounts. (Of course, all such data would remain with Stroz Friedberg and would not be shared with Facebook or its counsel until further order of the Court.)
- (2) An order that Six4Three, Mr. Kramer, and Six4Three's "legal team" including Messrs. Gross, Godkin, and Scaramellino work with Stroz Friedberg to take immediate steps to recover the deleted Dropbox ("tom@six4three.com), including to request reactivation of the account and to request any and all available records or logs of the account from Dropbox. Facebook respectfully suggests that any such order make clear that these steps should be taken *only* in conjunction with Stroz Friedberg and Facebook's outside counsel to ensure that no further evidence is lost or destroyed and that the appropriate protections are in place to preserve the forensic integrity of data relating to the account. (Of course, all such data would remain with Stroz Friedberg and would not be shared with Facebook or its counsel until further order of the Court.)
- (3) An order (pursuant to the parties' anticipated stipulation) clarifying that Stroz Friedberg is authorized to access the Gross & Klein Box account and directing Mr. Gross to cooperate with Stroz Friedberg to allow them to access and preserve all data relating to this matter that is stored on that account.²
- (4) An order that Messrs. Godkin, Gross, Kramer, *and Scaramellino* appear in person at the hearing scheduled for Friday, December 7.

² Facebook has no interest in any data on this cloud account that relates to Gross & Klein's other clients. Mr. Gross has represented that all materials relating to this matter are on the "Six4Three(Counsel Share-NO CLIENTS)" portion of the share, and, at this point, Facebook has no reason to dispute that representation.

Honorable V. Raymond Swope
December 3, 2018
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Facebook is of course happy to seek the above relief via *ex parte* application, should the Court permit Facebook to file such a request formally. However, given the urgency of these issues and continued risk of spoliation of evidence, we wanted to bring these matters to Your Honor's attention immediately and seek guidance as to whether the Court authorizes submission of an *ex parte* application.

We thank the Court for its continued time and attention to this matter, especially recognizing the Court's heavy docket.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Sonal N. Mehta', with a long horizontal flourish extending to the right.

Sonal N. Mehta
Counsel for Facebook, Inc.

cc: Counsel of Record